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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ARTEMIO GONZALES,

Defendant and Appellant.

H033310

(Monterey County

Super. Ct. No. SS041269)

The appeal in the present case follows defendant Artemio Gonzales's prior appeal and the remand for resentencing in that appeal.¹ Defendant was convicted of kidnapping Jane Doe I (Ellen) to commit rape (Pen. Code,² § 209, subd. (b)(1) – count one); attempted voluntary manslaughter of Ellen (§§ 192, subd. (a), 664 – count two); assault upon Ellen with intent to commit rape (§ 220 – count three); attempted forcible rape of Ellen (§§ 261, subd. (a)(2), 664 – count four); assault with force likely to produce great bodily injury upon Ellen (§ 245, subd. (a)(1) – count five); assault upon Jane Doe II (Sarah) with intent to commit rape (§ 220 – count six); unlawful sexual intercourse with a minor, Sarah, (§ 261.5, subd. (d) – count seven); oral copulation of a person under 16,

¹ Pursuant to Evidence Code section 452, subdivision (d), we have taken judicial notice of the record from defendant's prior appeal in *People v. Gonzales* (April 25, 2008, H030446) [nonpub. opn.] (*Gonzales I*).

² All further statutory references are to the Penal Code.

Sarah, (§ 288a, subd. (b)(2) – count eight); lewd act upon a child, Sarah, (§ 288, subd. (c)(1)) – count nine); false imprisonment of Sarah by violence (§ 236 – count 10); and misdemeanor possession of child pornography (§ 311.11, subd. (a) – count 11). The jury also found true the enhancements for great bodily injury (§ 12022.7) attached to counts one, three, and five, and for great bodily injury during a sex offense (§ 12022.8) attached to count four.

In August 2005, the trial court sentenced defendant to a determinate term of 17 years and eight months consecutive to an indeterminate term of life with possibility of parole. Following an appeal, this court reversed the judgment and remanded for resentencing. On remand, the trial court sentenced defendant to a determinate term of 13 years consecutive to an indeterminate term of life with possibility of parole.

On appeal, defendant contends: (1) the trial court erred in imposing the upper term on count three; (2) section 654 bars imposition of separate terms on counts one, two, and three; and (3) he has a constitutional right to a jury trial on the factual findings regarding application of section 654. For the reasons stated below, we affirm.

I. Statement of Facts³

On April 11, 2004, defendant sexually assaulted 15-year-old Sarah. Later that same night, he was driving on a street in Salinas when he saw Ellen, who was working as a prostitute. After she asked him if he wanted a date, he said yes, and they negotiated payment. Ellen got into defendant's jeep, and defendant drove away. Ellen became concerned, however, because defendant was driving into a more remote area. She asked him to drive her back to where they had met, but he refused.

Defendant eventually pulled over to the side of the road, grabbed Ellen, and told her to orally copulate him. Ellen exited the jeep and ran. Defendant caught her, pulled

³ Since defendant has raised sentencing issues relating to counts one, two, and three, we include facts relevant only to those charges.

her to the ground, punched her in the face and chest, choked her, and hit her head against the ground. He threatened to kill her. As he cut off her airway, he told her that if she gave him oral sex, he would let her go. Ellen agreed, but she fought back when he let go of her neck.

As defendant and Ellen struggled, defendant began ripping off her clothes. He then dragged her into a muddy irrigation ditch where he began strangling her. When cars drove by, defendant threatened to kill her if she screamed. Defendant pushed her head into the water and she lost consciousness. When Ellen woke up, defendant was gone. Ellen's injuries were "[v]ery serious" and "life threatening."

II. Discussion

A. Law of the Case Doctrine

The People contend that defendant's sentencing claims are barred under the doctrine of the law of the case.

"Under the law of the case doctrine, when an appellate court 'states in its opinion a principle or rule of law necessary to the decision, that principle or rule becomes the law of the case and must be adhered to throughout [the case's] subsequent progress, both in the lower court and upon subsequent appeal. . . .'" [Citation.] Absent an applicable exception, the doctrine 'requir[es] both trial and appellate courts to follow the rules laid down upon a former appeal whether such rules are right or wrong.' [Citation.] As its name suggests, the doctrine applies only to an appellate court's decision on a question of law; it does not apply to a question of fact." (*People v. Barragan* (2004) 32 Cal.4th 236, 246.)

Defendant argues, however, that the law of the case doctrine is inapplicable, because this court "reversed [his] sentence in its entirety and remanded the case for imposition of an entirely new sentence. . . . [T]he only actual holding with respect to sentencing was that the court below erred in imposing a full-term consecutive section

667.6, subdivision (d) term on count 6 This Court expressly addressed [his] ‘other sentencing issues’ only for ‘the guidance of the trial court on remand’ – not as a final holding.”

Assuming that the law of the case doctrine is not applicable because this court’s discussion of the points of law regarding sentencing was not necessary to the prior decision, we conclude that the trial court did not err in sentencing defendant.

B. Imposition of Upper Term on Count Three

Relying on *Cunningham v. California* (2007) 549 U.S. 270 (*Cunningham*) and *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*), defendant argues that the trial court erred by sentencing defendant to the upper term on count three (assault on Ellen with intent to commit rape), because the facts upon which this term was based were neither found true by the jury beyond a reasonable doubt nor admitted by defendant.

In *Gonzales I*, this court considered defendant’s Sixth Amendment argument that the trial court erred by imposing the upper term on count three. We summarized the relevant principles of law as stated in *Cunningham, supra*, 549 U.S. 270 and *Blakely, supra*, 542 U.S. 296, and *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*). (*Gonzales I, supra*, [at pp. 27-28].) This court upheld the trial court’s imposition of an upper term sentence on count three based on its analysis of the California Supreme Court’s opinion in *People v. Black* (2007) 41 Cal.4th 799 (*Black II*), stating that “the trial court may sentence defendant in accordance with *Black II* on remand.” (*Gonzales I*, [at p. 28].)

On remand, the trial court imposed the upper term on count three based on the following factors in aggravation: the crime involved great violence, bodily injury, or threat of harm or bodily harm; defendant’s violent conduct indicated a danger to society; defendant’s prior convictions were increasing in severity; defendant was on probation when the offense was committed, and defendant’s prior performance on probation was

unsatisfactory. The trial court also found that the aggravating factors outweighed the mitigating factor of defendant's mental condition, and imposed the upper term on count three. Thus, the trial court's imposition of sentence complied with *Black II*.

As defendant acknowledges, this court is bound by the holding in *Black II* that a trial court can consider a defendant's criminal history as an aggravating factor to support the imposition of an upper term. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Accordingly, we reject defendant's argument.

C. Section 654

Defendant next contends that section 654 bars consecutive terms for counts one (kidnapping Ellen with intent to commit rape), two (attempted voluntary manslaughter of Ellen) and three (assault on Ellen with intent to commit rape). He asserts that all three counts had a single objective, that is, forcible sex with the victim. We disagree.

In resentencing defendant, the trial court stated that it would make many of the same findings that it made at the original sentencing hearing. The trial court sentenced defendant to a life term on count one, but did not make a specific finding regarding the relationship of count one to counts two and three for purposes of section 654. The trial court found that the attempted voluntary manslaughter count was "totally independent" of the assault to commit rape, and imposed a consecutive term.

As this court stated in *Gonzales I*, "[s]ection 654 provides in relevant part: 'An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.' (§ 654, subd. (a).) Thus '[s]ection 654 precludes multiple punishment for a single act or omission, or an indivisible course of conduct.' (*People v. DeLoza* (1980) 18 Cal.4th 585, 591.) Whether multiple offenses are incident to one objective "depends on the *intent and objective* of the actor.'" (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208.)

The trial court's determination that a defendant maintained multiple criminal objectives is a question of fact which must be upheld if supported by substantial evidence. (*People v. Osband* (1996) 13 Cal.4th 622, 730.)” (*Gonzales I, supra*, [at pp. 24-25].) The appellate court reviews the evidence ““in a light most favorable to the respondent and presume[s] in support of the [sentencing] order the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]” [Citation.]’” (*People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1312-1313.)

In applying these principles, this court reasoned: “Here, the jury found that defendant kidnapped and assaulted Ellen with the intent and objective to rape her. However, the evidence also establishes that defendant had another intent and objective in assaulting Ellen, that is, to perform oral copulation upon him. When they were in the Jeep, he told her to orally copulate him. He also made the same demand when he held her on the ground and was choking her.” (*Gonzales I, supra*, [at p. 25].) Thus, there was substantial evidence to support the trial court's implied finding that one of defendant's objectives during the assault, forcible oral copulation, was independent of his objective in kidnapping Ellen, that is, to rape her. Accordingly, the trial court did not err in the imposing separate terms for the kidnap and the assault.

This court then stated in *Gonzales I*, “[w]hile strangling Ellen and beating her head on the ground, defendant told her that he would release her if she would give him oral sex. However, when he let go of her, she continued to struggle against him. Defendant then chased her and ripped off her clothing. As previously stated, defendant's intent and objective in committing this assault was forcible oral copulation and rape. However, defendant's subsequent conduct indicated a separate intent and objective, which was to kill her. Defendant dragged Ellen into a ditch where he continued to strangle her, hit her head on the ground, and pushed her face into the water.” (*Gonzales I, supra*, [at p. 25].) Since there was substantial evidence to support the trial court's finding that defendant

had abandoned his objectives of forcible oral copulation and rape, and intended to kill Ellen, the trial court did not err under section 654.

D. Imposition of Consecutive Terms on Counts One, Two, and Three

Defendant also contends that he has a constitutional right to a jury trial on the factual findings regarding application of section 654. Thus, he claims that the terms for counts two and three should be stayed.

In *Apprendi, supra*, 530 U.S. 466, the United States Supreme Court held: “Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” (*Apprendi*, at p. 490.) The court further defined the statutory maximum in *Blakely, supra*, 542 U.S. 296: “[T]he ‘statutory maximum’ for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. . . . In other words, the relevant ‘statutory maximum’ is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings.” (*Blakely*, at pp. 303-304.) In *Cunningham, supra*, 549 U.S. 270, the court held that California’s determinate sentencing law “violates a defendant’s right to trial by jury” to the extent that it allows the trial court to impose an upper term sentence “based on a fact, other than a prior conviction, not found by a jury or admitted by the defendant.” (*Cunningham*, at pp. 274, 275.)

As the court explained in *People v. Cleveland* (2001) 87 Cal.App.4th 263 (*Cleveland*), “section 654 is not a sentencing ‘enhancement.’ On the contrary, it is a sentencing ‘reduction’ statute. Section 654 . . . is a discretionary benefit provided by the Legislature to apply in those limited situations where one’s culpability is less than the statutory penalty for one’s crimes. Thus, when section 654 is found to apply, it effectively ‘reduces’ the total sentence otherwise authorized by the jury’s verdict. The

rule of *Apprendi*, however, only applies where the nonjury factual determination *increases* the maximum penalty beyond the statutory range authorized by the jury's verdict." (*Cleveland*, at p. 270.) Since nothing in the *Apprendi/Blakely/Cunningham* line of cases affects this analysis, we adopt the reasoning of *Cleveland*. Accordingly, we conclude that defendant did not have the right to a jury trial on the factual findings regarding the application of section 654.

III. Disposition

The judgment is affirmed.

Mihara, J.

WE CONCUR:

Bamattre-Manoukian, Acting P. J.

McAdams, J.